IN THE HIGH COURT OFJUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.182 OF 1994
Nana Murlidhar Kale & ors.. Appellants

vs

The State of Maharashtra ... Respondent

Mr.Milind Parab for Appellant no.1
Mr.A.K.Apte for Appellant nos. 2 & 3
Ms.G.P.Mulekar, A.P.P. for Respondent

CORAM : D.G.DESHPANDE AND
SMT ROSHAN .S.DALVI, JJ
DATE: 24th November, 2006

JUDGMENT (Per Smt R.S.Dalvi,J)

1. The appellants in this appeal are three of the five accused in Sessions Case No.107 of 1993 who have been convicted for offences under sections 395,396 and 397 of IPC. The appellant no. 2 having died, his appeal has abated against him.

2. Upon a telephonic message having been received on 25th December, 1992 reporting upon an incident of the death of a person in Mandlecha shopping complex, at Geur, the inquest panchanama

was prepared and the clothes of the deceased came to be collected and sent for chemical analysis. The panchanama of the scene of the offence was also prepared. The investigation inter alia consisted of certain finger prints being collected and dog squad having been called. The dog trekking evidence is stated to have led to the hut of the accused where a wooden stick containing the blood of the victim came to be recovered at the instance of accused no. 2 since deceased. The accused nos. 1,2 and 3 came to be arrested. Their clothes were recovered and C.A.'s report was obtained. The C.A.'s report showed blood of the injured taken from his clothes matching the blood on the clothes of the accused and the sticks found in their hut.

3. The prosecution relied much upon the dog trekking evidence. We have been shown the judgments of the Supreme Court consistently holding that the dog trekking evidence per se is not

reliable though it may give the police a lead and can be relied only as one of the circumstances alongwith other circumstances which would point to the identity of the culprits. In the cases of **Pritam Singh & anr vs State of Punjab reported in AIR 1956 SC 415, Abdul Razak Murtaza Dafadar vs State of Maharashtra reported in AIR 1970 SC 283 and Gade Lakshmi Mangaraju alias Ramesh vs State of A.P. reported in (2001) 6 Supreme Court cases 205** have shown the frailities in the evidence based upon tracker dogs. It has been held in the case of Gade Lakshmi (supra) that the possibility of error, misunderstanding, misrepresentation, wrong inference, and uncertainty cannot be ruled out in such evidence.

4. In this case, two of the five accused who were charged for the offence of dacoity have been acquitted. The State has not filed an appeal against their acquittal. It is contended on behalf of the learned Advocate for the appellants Mr. A.K.Apte

that in those circumstances, the charge against the appellants herein can only be for lesser offence of robbery under section 392 IPC. This has been held in the case of **Om Prakash & anr vs State of Rajasthan reported in AIR 1998 SC 1220**. In that case, the appellants were convicted under section 395 IPC. Case against three of the five accused was established beyond reasonable doubt as held by the trial Court as well as the High Court. It was held that as the charge of dacoity was against five persons, out of whom two were acquitted by the trial Court, the three remaining accused could not be properly convicted under section 395 IPC. It was therefore, held that their conviction would have to be altered to the one under section 392 IPC. The sentence was accordingly reduced.

5. Even in the case of **Ramshankar Singh vs State of U.P. reported in AIR 1956 SC 441** in the trial of six persons, tried under the charge of dacoity,

three were acquitted on the ground that evidence against them were tainted. Remaining three were convicted by the High Court for the charge under section 395 IPC. In that judgment, it was observed that the remaining accused could only be convicted considering their individual acts in connection with the alleged occurrence. It was observed that the evidence led on behalf of the prosecution did not bring home the charge against 3 of the accused. Consequently, the remaining accused were convicted for lessor offence under section 392 IPC.

6. In this case, accused nos. 4 and 5 were acquitted. Though the blood group of the injured deceased matched the blood on the stick found in the house of the appellants, it could not be said that they, alongwith other remaining accused, committed dacoity. Since no commission of the offence of daocity on the part of the accused is seen, it would be unjust to convict the accused under any of the

sections 395, 396 or 397 IPC. In the case of Ram Lakhan vs State of U.P. reported in (1983) 2 Supreme Court cases 65 it has been specifically held that when all the accused except the appellant came to be acquitted, the appellant cannot alone be convicted under section 395 IPC.

7. Similarly, in Re: **Chinchoo Lingayya reported in AIR 1958 AP 510,** it was held that where 5 persons were charged under section 395 IPC and one of them was acquitted and it was not the prosecution case that there were any more persons who took part in the dacoity, the remaining 4 persons cannot be convicted under section 395 IPC.

8. In the circumstances, appeal succeeds. Hence, the following order :

1. Appeal is partly allowed.

2. So far as Accused No.2 is concerned, he is dead, as verified from Addl.P.P.. Therefore appeal against Accused no.2 is abated.

3. So far accused nos. 1 and 3 are concerned, they are acquitted of the offences punishable under Sections 395, 396 and 397 of the Indian Penal Code. But they are convicted under section 392 of the Indian Penal Code. They have already been in jail for more than 14 years. The maximum sentence prescribed under section 392 is 10 years. Therefore, their undergone sentence is reduced to ten years and, therefore they should be released forthwith, if not required in any other case.

4. Office to send copy of this order immediately to the accused in jail.

(Smt R.S.Dalvi, J) **(D.G.Deshpande, J)**